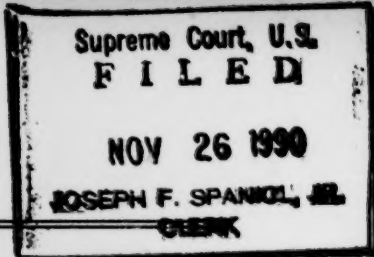


(1)  
**90-884**

No. \_\_\_\_\_



In The  
**Supreme Court of the United States**  
October Term, 1990

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CURTIS REED JOHNSON,

*Petitioner and  
Cross-Respondent,*

vs.

HOME STATE BANK,

*Respondent and  
Cross-Petitioner.*

---

On Cross-Petition For Writ Of Certiorari  
To The United States Court Of  
Appeals For The Tenth Circuit

---

**CROSS-PETITION FOR WRIT OF CERTIORARI**

---

\*CALVIN D. RIDER  
LEO R. WETTA  
DENNIS E. SHAY  
PATRICIA M. DENGLER  
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*\*Counsel of Record for Respondent  
and Cross-Petitioner*



**A. QUESTIONS PRESENTED FOR REVIEW**

1. Whether debtor's Chapter 13 Plan was proposed in good faith?
2. Whether debtor's Chapter 13 Plan is feasible?
3. Whether a creditor that has been stayed from taking any action against the debtor is entitled to receive continued payments from a debtor remaining in possession of, and receiving income and government subsidies from, his property during the pendency of an appeal?

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No. \_\_\_\_\_

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In The  
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**On Cross-Petition For Writ Of Certiorari  
To The United States Court Of  
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---

**CROSS-PETITION FOR WRIT OF CERTIORARI**

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Cross-Petitioner, Home State Bank, respectfully prays that if a Writ of Certiorari is issued to review the judgment of the Tenth Circuit as sought by the Petitioner, then a Writ should also issue to address the questions presented by this conditional Cross-Petition.

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#### D. REPORTS OF OPINIONS BY OTHER COURTS

1. *In Re Johnson*, 904 F.2d 563 (10th Cir. 1990).
2. *In Re Johnson*, 96 B.R. 326 (D.Kan. 1989).
3. *In Re Johnson*, Case No. 87-10585, Slip Op. (Bankr. D.Kan. Apr. 8, 1988).

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#### E. JURISDICTION

1. The United States Court of Appeals for the Tenth Circuit entered its judgment June 7, 1990. The same Court issued an order denying Debtor's petition for rehearing with suggestion for rehearing *en banc* on August 1, 1990. On February 27, 1989, the United States District Court for the District of Kansas issued its order for stay pending appeal. On May 4, 1989, the District Court for the District of Kansas issued its memorandum order denying this Cross-Petitioner's motion to terminate or vacate the stay pending appeal. On May 18, 1989, the same Court denied Cross-Petitioner's motion for reconsideration. On October 1, 1990, the District Court ordered all remaining funds held by the trustee to be distributed to Debtor's counsel.

2. Cross-Petitioner relies upon Rule 12.3 of the Rules of the Supreme Court of the United States for its Cross-Petition for Writ of Certiorari. Cross-Petitioner received the Petition for a Writ of Certiorari in connection with which this cross-petition is filed on October 29, 1990.

3. Jurisdiction is conferred on this Court by 28 U.S.C. §1254(1).

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## F. STATUTES AND RULES INVOLVED

1. 11 U.S.C. §362(d): On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay -
  - (1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or
  - (2) with respect to a stay of an act against property under subsection (a) of this section, if -
    - (A) the debtor does not have an equity in such property; and
    - (B) such property is not necessary to an effective reorganization
2. Rule 8 of the Federal Rules of Appellate Procedure - Stay or Injunction Pending Appeal
  - (a) Stay Must Ordinarily Be Sought in the First Instance in District Court; Motion for Stay in Court of Appeals

Application for a stay of the judgment or order of a district court pending appeal, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring, or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the district court. A motion for such relief may be made to the court of appeals or to a judge thereof, but the motion shall show that application to the district court for the relief sought is not practicable, or that the district court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the district court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute, the motion shall

be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant. Reasonable notice of the motion shall be given to all parties. The motion shall be filed with the clerk and normally will be considered by a panel or division of the court, but in exceptional cases where such procedure would be impracticable due to the requirements of time, the application may be made to and considered by a single judge of the court.

(b) Stay May Be Conditioned Upon Giving of Bond; Proceedings Against Sureties

Relief available in the court of appeals under this rule may be conditioned upon the filing of a bond or other appropriate security in the district court. If security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the district court and irrevocably appoints the clerk of the district court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. A surety's liability may be enforced on motion in the district court without the necessity of an independent action. The motion and such notice of the motion as the district court prescribes may be served on the clerk of the district court, who shall forthwith mail copies to the sureties if their addresses are known.

(c) Stays in Criminal Cases

Stays in criminal cases shall be had in accordance with the provisions of Rule 38(a) of the Federal Rules of Criminal Procedure.

3. Rule 62 of the Federal Rules of Civil Procedure (see App. 10).



## G. STATEMENT OF THE CASE

### Introduction

The Petitioner (hereinafter "Johnson" or "Debtor") filed a Chapter 13 bankruptcy attempting to reamortize a lien that survived his Chapter 7 bankruptcy after being discharged of his debts. The Bankruptcy Court confirmed Johnson's amended Chapter 13 plan over the objection of the Respondent (hereinafter "Bank"). The District Court reversed the Bankruptcy Court and the Tenth Circuit Court of Appeals affirmed the District Court. The District Court and the Tenth Circuit Court of Appeals did not reach the good faith and feasibility issues raised by the Bank because of their holdings that a debtor's Chapter 13 plan cannot be confirmed where it improperly schedules a debt previously discharged under Chapter 7. For the same reasons, the Tenth Circuit Court of Appeals did not consider the issue of the stay pending appeal raised by the Bank.

The Bankruptcy Court was conferred with federal jurisdiction by 28 U.S.C. §1334 and 28 U.S.C. §157.

### Background

<sup>1</sup>On September 7, 1984, Johnson and his wife (hereinafter "Johnsons") executed a deed to their son, transferring to him all of their ownership in a quarter section of land, which is property at issue here. Approximately one

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<sup>1</sup> Cross-Petitioner draws from the facts recited by the Tenth Circuit and District Courts in their opinions. See, *In Re Johnson*, 96 B.R. at 326-28; *In Re Johnson*, 904 F.2d at 564.

month later, on October 9, 1984, the Johnsons filed their joint Chapter 7 bankruptcy.

On April 11, 1985, the Bankruptcy Court discharged the Johnsons from all dischargeable debts.

On remand from the Kansas Supreme Court, *Home State Bank v. Johnson*, 240 Kan. 417, 729 P.2d 1225 (1986), the Edwards County, Kansas, District Court granted the Bank judgment on its second mortgage *in rem* in the principal amount of \$100,000.00, plus accumulated interest. The Court also found that the balance due on the first mortgage purchased by the Bank from Traveler's Insurance Company (hereinafter "Travelers") amounted to \$100,447.22. Further, the Court granted the Bank an *in rem* judgment in the amount of \$1,757.96 for taxes paid by the Bank. Finally, the Court entered an order of sale specifying the property be sold by the sheriff on April 3, 1987.

On March 2, 1987, while foreclosure proceedings were pending and one month before the property was scheduled to be sold by the sheriff, Johnson filed his voluntary Chapter 13 petition in bankruptcy. On February 24, 1987, Johnson's wife, son, and daughter-in-law had executed quitclaim deeds to Johnson, consolidating ownership of all subject property in issue to Johnson. The quitclaim deeds were filed for record at the Edwards County Register of Deeds on February 26, 1987. Johnson listed the Bank as a partially-secured creditor. The Bank filed a secured proof of claim in this matter in the amount of \$511,421.55, and on June 3, 1987, the Bank filed a detailed objection to the confirmation of the Debtor's proposed plan. Johnson filed an amended plan after the

Bankruptcy Court held Debtor's first plan was "not confirmable for lack of feasibility under present circumstances."

Under the amended plan, the Debtor proposed to pay to the Bank the Edwards County District Court judgment in five annual installments of \$11,100.00, \$35,520.00, \$35,520.00, \$38,850.00, and \$19,425.00, with a final balloon payment of \$80,625.92 at the conclusion of the five-year plan. The plan further proposes to make monthly payments in the amount of \$291.42 to Mid Kansas Federal Savings & Loan, the only other creditor in Johnson's plan, with a balloon payment of \$6,507.00 to that institution at the end of the 60-month plan.

During its five (5) year term, Johnson's amended plan provides no payment to unsecured creditors and provides no cure to any arrearages. During the pendency of the bankruptcies and appeals, Johnson has remained in possession of the property and received farm income and government subsidies.

Johnson's amended plan calls for the borrowing of one hundred sixty-three (163) percent of his estimate of the appraised value of the subject property at the conclusion of the plan.

Johnson was only eligible to file his Chapter 13 bankruptcy because his unsecured debt had been discharged in his prior Chapter 7 bankruptcy.

Johnson neither attempted nor negotiated a reaffirmation of the discharged debt during his Chapter 7 bankruptcy.

The Bankruptcy Court subsequently confirmed Johnson's amended plan over the Bank's objections. The District Court reversed the Bankruptcy Court, and on June 7, 1990, the Tenth Circuit Court of Appeals entered its judgment affirming the District Court.

Upon motion of the Debtor, the District Court issued an order for stay pending appeal on February 27, 1989.<sup>2</sup> The order provided that, as adequate protection for the stay, both creditors were prevented from pursuing any action against Johnson or his property, that Johnson "shall continue to make the monthly and annual payments due under the terms of the plan of reorganization confirmed by the Bankruptcy Court. . . . Said stay, however, is subject to the Debtor's payment of the adequate protection payments delineated herein." Under the terms of the stay, the trustee is to hold all funds and annual payments due to the Bank. If Johnson was unsuccessful in his appeal to the Tenth Circuit Court of Appeals, the trustee was to return to Johnson all funds, plus accumulated interest. On the other hand, in the event Johnson was successful in his appeal to the Tenth Circuit, the funds would be disbursed to the Bank without accumulated interest.

Pursuant to his plan, Johnson has made only one payment to the Bank in the amount of \$10,000.00 since 1987 and is delinquent in his payments in the amount of \$109,890.00 as of December 1, 1990.

On May 4, 1989, the District Court denied the Bank's motion to terminate or vacate the stay pending appeal

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<sup>2</sup> See App. 1.



based upon the Debtor's failure to make his second annual payment in the amount of \$35,520.00 to stay the appeal.<sup>3</sup> In denying the Bank's motion, the District Court allowed the Debtor to substitute a payment in the amount of \$17,000.00 to be held by the trustee.

On December 22, 1989, the Bankruptcy Court issued an order approving Debtor's attorneys' fees to be paid out of the \$17,000.00 held by the trustee in the amount of \$3,387.43.<sup>4</sup>

On the 1st day of October, 1990, the District Court sustained the motion of the Debtor to disburse the balance of funds held by the trustee to Debtor's counsel.<sup>5</sup>

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#### H. CONTENTIONS IN SUPPORT OF CROSS-PETITION

##### **Johnson's Chapter 13 Plan Was Not Proposed in Good Faith and Is Not Feasible**

The Tenth Circuit Court of Appeals indicated the Bank presented compelling arguments to both the good faith and feasibility issues. *In Re Johnson*, 904 F.2d at 566 (10th Cir. 1990).

Debtor argues that his Petition for Writ of Certiorari should be granted because this case is in direct conflict with the decision of two other Circuit Courts of Appeal.<sup>6</sup>

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<sup>3</sup> See App. 4.

<sup>4</sup> See App. 5.

<sup>5</sup> See App. 8.

<sup>6</sup> See, *In Re Saylors*, 869 F.2d 1434 (11th Cir. 1989); *In Re Metz*, 820 F.2d 1495 (9th Cir. 1987).

Both decisions cited by Johnson reviewed the good faith of a debtor before allowing a debtor to schedule a debt in a Chapter 13 bankruptcy that had been discharged in a previous Chapter 7 bankruptcy.

If the Court grants Debtor's petition in No. 90-693, we believe that it should review the entire case and consider the issues of Debtor's good faith and feasibility, which have not been decided below but which have been preserved for appeal. Unless the issues of good faith and feasibility are addressed, this Court would be deciding an issue raised in Johnson's petition, which was not addressed by the two Circuit opinions Johnson alleges conflict with the Tenth Circuit opinion.

**The Bank is Entitled to Receive Continued Payments Under Debtor's Chapter 13 Plan During The Pendency of This Appeal**

The Debtor has remained in possession of his property, received income from farming, government subsidies, and PIK payments, while the Bank has received only one \$10,000.00 payment since 1987.

Due to the District Court's orders for the stay pending appeal, Johnson was not required to make any payments during the pendency of this appeal to the Bank but was required to continue making payments to the only other creditor, Mid Kansas Federal Savings & Loan, Wichita, Kansas.

The District Court's decision regarding the stay pending appeal is in direct conflict with a decision of this



Court.<sup>7</sup> Contrary to its February 27, 1989, Order, the District Court applied the automatic stay provisions of 11 U.S.C. §362(d) rather than the stay pending appeal provisions of Rule 8 of the Federal Rules of Appellate Procedure and Rule 62 of the Federal Rules of Civil Procedure.<sup>8</sup>

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<sup>7</sup> *United Savings v. Timbers of Inwood Forest*, 484 U.S. 365, 98 L.Ed.2d 740, 108 S.Ct. 626 (1988).

<sup>8</sup> The *Timbers* Court specifically noted that, while the bankruptcy code did not provide undersecured creditors with interest payments on the value of their collateral during the automatic stay, the creditor is entitled to such periodic payments after the plan is confirmed. 484 U.S. at 377, 98 L.Ed.2d at 752. See also *Nicholas v. United States*, 384 U.S. 678, 683, 16 L.Ed.2d 853, 859, 86 S.Ct. 1674 (1966), where this Court stated that creditors should not be disadvantaged by legal delays attributable solely to the time-consuming procedures inherent in the administration of the bankruptcy laws.

## I. CONCLUSION

For the foregoing reasons, it is respectfully submitted that, in the event the Court should grant the Petition for Writ of Certiorari in No. 90-693, this Cross-Petition for Writ of Certiorari should, likewise, be granted.

Respectfully submitted,

\*CALVIN D. RIDER  
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*\*Counsel of Record for  
Cross-Petitioner and Respondent*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

IN RE: )  
CURTIS REED JOHNSON, )  
Debtor. )  
\_\_\_\_\_)

ORDER FOR STAY PENDING APPEAL  
Filed Feb. 27, 1989

On February 8, 1989, the court took up hearing on the debtor/appellant's motion for stay pending appeal pursuant to Fed.R.App.P. 8, and entered directives in connection therewith. Following that hearing, the Home State Bank of Lewis, Kansas moved for rehearing or reconsideration of the court's findings. The motion of Home State Bank is overruled. Accordingly, the court finds as follows:

1. That the Home State Bank of Lewis, Kansas is hereby stayed from pursuing any further action against the debtor or his property in any District Court of the State of Kansas and in the United States Bankruptcy Court for the District of Kansas.

— 2. That Mid-Kansas Federal Savings and Loan Association is stayed from pursuing any action against the debtor or his property in any District Court of the State of Kansas and in the United States District Court for the District of Kansas.

3. That as adequate protection for the above stays issued against said creditors, the debtor shall continue to make the monthly and annual payments due under the

## App. 2

terms of the plan of reorganization confirmed by the bankruptcy court.

4. That upon the trustee's receipt of the aforesaid funds from the debtor due pursuant to the terms of the aforesaid plan of reorganization, the trustee shall:

(a) With regard to annual payments received by the trustee, the trustee shall invest such funds in a separate, segregated account and shall not disburse same to the Home State Bank of Lewis, Kansas pending a determination by the Tenth Circuit Court of Appeals. In the event this court's decision is affirmed by the Tenth Circuit Court of Appeals, the trustee is directed to return any such funds to the debtor plus accumulated interest. In the event this court's decision is reversed by the Tenth Circuit Court of appeals, the trustee is directed, upon the expiration of the time for appeal, to disburse said funds to the Home State Bank of Lewis, Kansas pursuant to the terms of the confirmed plan.

(b) With regard to the monthly payments received by the trustee which are payable to Mid-Kansas Federal Savings and Loan under the terms of the aforesaid plan of reorganization, the trustee is directed to disburse said funds and administer them as if the plan were confirmed.

5. With regard to the proceeds from oil and gas production on the property owned by the debtor, said funds shall continue to be received by the Home State Bank of Lewis, Kansas pursuant to the terms of the aforesaid plan of reorganization, and shall be applied by said bank to the outstanding indebtedness

App. 3

owed by the debtor as provided for in the terms of said plan.

IT IS ACCORDINGLY ORDERED this 27 day of February, 1989, that the debtor/appellant's motion for stay pending appeal pursuant to Fed.R.App.P. 8 is sustained, and that the creditors of said debtor are stayed from pursuing any action against the debtor or his property in any District Court of the State of Kansas and in the United States Bankruptcy Court for the District of Kansas, pending resolution of the appeal herein to the Tenth Circuit Court of Appeals. Said stay, however, is subject to the debtor's payment of the adequate protection payments delineated herein.

/s/ Patrick F. Kelly  
PATRICK F. KELLY, JUDGE

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App. 4

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

IN RE: )  
CURTIS REED JOHNSON, )  
Debtor. )  
\_\_\_\_\_ )

MEMORANDUM ORDER  
Filed May 4, 1989

The court has at hand the motion of Home State Bank to terminate or vacate the stay pending appeal, as directed on February 27, 1989. The bank complains that the debtor has failed or refused to comply with certain directives set forth in the court's order.

The court further has at hand the debtor's response, which takes issue with the bank's complaint. Given the representations of counsel Gilman on behalf of the debtor, the motion to terminate or vacate the stay is denied.

IT IS SO ORDERED this 4 day of May, 1989.

/s/ Patrick F. Kelly  
PATRICK F. KELLY, JUDGE

\_\_\_\_\_

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF KANSAS

IN RE:	)	Case No.
CURTIS REED JOHNSON,	)	87-10585
	)	
Debtor.	)	Chapter 13
<hr/>		

ORDER APPROVING DEBTOR'S ATTORNEY'S  
FEES AS ADMINISTRATIVE EXPENSE  
FILED DEC 22 1989

NOW, on this 21st day of December, 1989, the above matter comes on for hearing on the Application to Approve Debtor's Attorney's Fees, Advances and Expenses as Administrative Expenses. The applicant appears by and through W. Thomas Gilman of Redmond, Redmond & Nazar. The Trustee appears *pro se*.

WHEREUPON, counsel for the applicant advises the Court as follows:

1. That an Application to Approve Debtor's Attorney's Fees, Advances and Expenses as Administrative Expenses was filed herein on October 3, 1989.
2. That said application provided that in the event any creditors or parties in interest had any objections to the proposed application, that written objections were to be filed with the Clerk of the United States Bankruptcy Court on or before October 24, 1989 at 5:00 p.m.
3. That counsel for the applicant has received no such objections.
4. That counsel for the applicant is seeking an order approving an award of \$6,941.43 in fees, advances and

App. 6

expenses and that after crediting payments received during the period in question, that the balance due on said amount, \$3,387.43, be paid to counsel for the Debtor and that the entire amount be accorded administrative expense priority herein.

WHEREUPON, the Trustee advises he has no objections to the application in issue.

WHEREUPON, the Court, having heard the statements of counsel, reviewed the file, and being duly and fully advised in the premises finds that the Application to Approve Debtor's Attorney's Fees, Advances and Expenses as Administrative Expenses should be and hereby is sustained.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that counsel for the Debtor be awarded \$6,941.43 in attorney's fees, advances and expenses from April 26, 1988 through August 31, 1989, that such award be accorded administrative expense priority, that the balance due on said amount, \$3,387.43, be remitted forthwith to counsel for the Debtor.

IT IS SO ORDERED.

Signed DEC 21 1989  
United States Bankruptcy Judge  
John K. Pearson  
Bankruptcy Judge



App. 7

SUBMITTED BY:

REDMOND, REDMOND & NAZAR

By /s/ W T G

W. Thomas Gilman  
Counsel for the Debtor  
200 W. Douglas  
Ninth Floor  
Wichita, KS 67202  
(316) 262-8361  
S.C. No. 11867

APPROVED:

By /s/ Royce E. Wallace

Royce E. Wallace, Trustee  
Wallace, Dewey & Zimmerman  
328 North Main, Suite 200  
Wichita, Kansas 67202

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

IN RE: )  
CURTIS REED JOHNSON, ) Case No.  
Debtor. ) 88-1270-K  
\_\_\_\_\_ )

ORDER OVERRULING MOTION FOR  
DISBURSEMENT OF FUNDS TO THE HOME STATE  
BANK HELD BY TRUSTEE FOR THE STAY PENDING  
APPEAL AND ORDERING DISBURSEMENT OF  
FUNDS TO THE DEBTOR  
Filed Oct. 1, 1990

NOW, on this 1st day of Oct., 1990, the above matter comes on for hearing on the Motion for Disbursement of Funds to the Home State Bank Held by the Trustee for the Stay Pending Appeal. The Movant appears by and through Calvin D. Rider of Smith, Shay, Farmer & Wetta. The Debtor appears by and through W. Thomas Gilman of Redmond, Redmond & Nazar. There are no other appearances.

WHEREUPON, the Court reviews the file and hears the arguments of counsel. Having reviewed the file and heard the arguments of counsel, the Court overrules the motion and orders that the Trustee disburse all remaining funds attributable to the initial \$17,000.00 deposit to counsel for the Debtor, which funds shall be used, in part, to satisfy the fees approved by the Bankruptcy Court in the case below, Case No. 87-10585, as allowed by the Order filed therein on August 9, 1990. The balance of said funds shall be retained by counsel for the Debtor in trust pending further order by the Bankruptcy Court.

IT IS SO ORDERED.

/S/ PATRICK F. KELLY  
PATRICK F. KELLY, JUDGE

SUBMITTED BY:

REDMOND, REDMOND & NAZAR

/s/ W T G  
W. Thomas Gilman  
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(316) 262-8361  
S.C. No. 11867  
Counsel for the Debtor

APPROVED BY:

/s/ Calvin D. Rider  
Mr. Calvin D. Rider  
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S.C. No. 12506  
Counsel for the Home State Bank  
of Lewis, Kansas

/s/ Royce E. Wallace  
Mr. Royce E. Wallace  
Wallace & Zimmerman  
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Suite 200  
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(316) 267-1791  
S.C. No. 05849  
Trustee

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**Rule 62. Stay of Proceedings to Enforce a Judgment**

**(a) Automatic Stay; Exceptions – Injunctions, Receiverships, and Patent Accountings.** Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action, or a judgment or order directing an accounting in an action for infringement of letters patent, shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of subdivision (c) of this rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

**(b) Stay on Motion for New Trial or for Judgment.** In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b).

**(c) Injunction Pending Appeal.** When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an

injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. If the judgment appealed from is rendered by a district court of three judges specially constituted pursuant to a statute of the United States, no such order shall be made except (1) by such court sitting in open court or (2) by the assent of all the judges of such court evidenced by their signatures to the order.

**(d) Stay Upon Appeal.** When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

**(e) Stay in Favor of the United States or Agency Thereof.** When an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.

**(f) Stay According to State Law.** In any state in which a judgment is a lien upon the property of the judgment debtor and in which the judgment debtor is entitled to a stay of execution, a judgment debtor is entitled, in the district court held therein, to such stay as would be accorded the judgment debtor had the action been maintained in the courts of that state.

**(g) Power of Appellate Court Not Limited.** the provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

**(h) Stay of Judgment as to Multiple Claims or Multiple Parties.** When a court has ordered a final judgment under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Apr. 17, 1961, eff. July 19, 1961; Mar. 2, 1987, eff. Aug. 1, 1987.)

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DEC 20 1990

JOSEPH F. SPANIO, JR.  
CLERK

In The  
Supreme Court of the United States  
October Term, 1990

CURTIS REED JOHNSON,

*Petitioner and  
Cross-Respondent,*

vs.

HOME STATE BANK,

*Respondent and  
Cross-Petitioner.*

Cross-Petition For Writ Of Certiorari  
To The United States Court Of  
Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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**A. QUESTION PRESENTED FOR REVIEW**

Should the Court grant a writ of certiorari on any of the questions presented for review by the Cross-Petitioner (hereinafter "the Bank") when none of those questions have been decided by the Court below?

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## C. TABLE OF AUTHORITIES

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#### D. STATEMENT OF THE CASE

Johnson disputes two statements made by the Bank in its Statement of the Case. First, the Bank states that "Johnson's Amended Plan provides no payment to unsecured creditors and provides no cure to any arrearages."<sup>1</sup> The reason Johnson's Plan provided for no payments to unsecured creditors was that there were no unsecured creditors. Johnson had previously discharged all unsecured claims and was attempting to reamortize in the Chapter 13 bankruptcy the remaining *in rem* claims against his property. The question of whether an *in rem* claim against a Debtor's property constitutes a "claim" within the meaning of 11 U.S.C. §101(4) is the basic legal issue for which Petitioner seeks a writ of certiorari.

Second, the Bank states that "Johnson's Amended Plan calls for the borrowing of one hundred sixty-three percent (163%) of his estimate of the appraised value of the subject property at the conclusion of the Plan."<sup>2</sup> It should be emphasized that this is only the Bank's opinion; no such finding was made by the Bankruptcy Court. In previous arguments, the Bank has argued that the Debtor's Plan called for the borrowing of an amount in excess of the value of the collateral which was to be offered as security, however, it should be noted that the Bankruptcy Court agreed with the Debtor and found that the amount to be borrowed was only fifty-six percent (56%) of the market value of the collateral.<sup>3</sup> Thus, it

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<sup>1</sup> See, Cross-Petition for Writ of Certiorari, p. 7. -

<sup>2</sup> See, Cross-Petition for Writ of Certiorari, p. 7.

<sup>3</sup> See, *In Re Johnson*, Case No. 87-10585, Slip. Op. (Bankr. D. Kan. Apr. 8, 1988), at Appendix 31 to Johnson's Petition for Certiorari, No. 90-693.

should be noted that it is the Bank's *opinion* that Johnson's Amended Plan called for borrowing one hundred sixty-three percent (163%) of the estimated value of the property to be offered as collateral for the loan.

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### E. SUMMARY OF ARGUMENT

The Bank's Cross-Petition for Certiorari should not be granted because it seeks certiorari on three questions which were not decided by the Court below (in fact, two of the questions presented, feasibility and good faith, have not been decided by *any appellate court* in this case so far) and because the Bank has failed to establish that any of its questions presented for review fit within the considerations governing review on certiorari established at Rule 10 of the Supreme Court Rules.

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### F. ARGUMENT

**None of the Questions Raised by the Bank for Review Have Been Decided by the Court Below.**

The Bank argues that this Court should grant certiorari to determine whether the Bankruptcy Court was correct in holding that Johnson's Plan was submitted in good faith and was feasible. Neither the Tenth Circuit Court of Appeals nor the District Court ruled on the questions of good faith or feasibility because it was unnecessary to do so after those courts ruled that Johnson

owed no "debt" to the Bank.<sup>4</sup> In deciding the issue, this Court would essentially have to review the trial court's record and determine whether its decision is clearly erroneous as those findings are findings of fact.<sup>5</sup> Such a determination is not appropriate in this case.

The Bank also asks this Court to determine whether the District Court's stay pending appeal was proper given the fact that no funds were ordered to be turned over to the Bank as a condition of the stay. Again, this issue was not addressed by the Court below and is not an appropriate issue to be addressed by this Court.

**The Bank Has Not Raised Any Questions for  
Review That Fit Within the Considerations  
Governing Review on Certiorari Set Forth in  
Rule 10 of the Supreme Court Rules.**

The Bank asks this Court to grant certiorari to review a decision by the Bankruptcy Court on good faith and feasibility and the decision by the District Court on its stay pending appeal to the Tenth Circuit Court of Appeals. Rule 10.1 of the Supreme Court Rules is clear. It indicates that the types of cases this Court should grant certiorari on are those where a decision by a *federal court of appeals* is in conflict with the decision of another federal court of appeals or a state court of last resort. The questions raised by ~~the~~ Bank do not meet the considerations

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<sup>4</sup> See, Johnson's Petition for Certiorari, No. 90-693, for an explanation of the Court's rulings on this issue.

<sup>5</sup> See, *Matter of Metz*, 820 F.2d 1495 (9th Cir. 1987) and *Education Assistance Corp. v. Zellner*, 827 F.2d 1222 (8th Cir. 1987).

established by the Court in determining when a Cross-Petition for Certiorari should be granted.

The Bank indicates that the District Court's ruling on the stay pending appeal to the Tenth Circuit is in conflict with *United Savings v. Timbers of Inwood Forest*, 484 U.S. 365, 98 L.Ed.2d 740, 108 S.Ct. 626 (1988). The Bank's assertion, however, is incorrect. The issue in *Timbers of Inwood Forest*, *supra*, was whether an unsecured creditor was entitled to receive from the Debtor "monthly payments for the use value of the loan collateral which the bankruptcy's stay prevented [the creditor] from possessing." *Id.*, at 484 U.S. 368, 98 L.Ed.2d 746, 108 S.Ct. 628. Here, the issue has nothing to do with adequate protection or relief from stay. Simply put, the District Court, after reversing the Bankruptcy Court's confirmation of the Debtor's Chapter 13 Plan, granted a stay pending the appeal to the Tenth Circuit Court of Appeals. The issues are not even remotely similar and the District Court's decision does not conflict with the *Timbers*, *supra*, decision.

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### G. CONCLUSION

For the above and foregoing reasons, Johnson requests that the Court deny the Bank's Cross-Petition for Certiorari.

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